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IN THE

Supreme Court of the United States

ANDREW J. ORKIN, F. MARK ORKIN
and SARAH-ROSE JOSEPHA ADLER,

Petitioners,

v.

ELIZABETH TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a "Sense of Congress" provision included in the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998), creates a private right of action for restitution of art allegedly confiscated by the Nazis.

2. Whether a hearing must be held on an affirmative state statute-of-limitations defense prior to dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6), where the allegations of the complaint demonstrate on their face that the claims are untimely.

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STATEMENT OF THE CASE

Although the subject matter of this case is intriguing, the background relevant to the decision of the Court of Appeals is straightforward. The painting at issue was purchased by Margarete Mauthner in the early 1900s. Pet. App. 3a. While the parties dispute the circumstances under which Mauthner lost possession of the painting, as well as some aspects of the subsequent chain of ownership, they agree that the painting was later acquired by a German-Jewish businessman named Alfred Wolf. *Id.* 3a-5a. Wolf's estate commissioned Sotheby's to sell the painting, and it was purchased for respondent Elizabeth Taylor at a public auction in 1963. *Id.* 5a-6a. A 1970 *catalogue raisonné*[1] noted Taylor's ownership in 1986-87; the painting was exhibited at the Metropolitan Museum of Art; and Taylor offered the painting at a public auction at Christie's in 1990 (it did not sell). *Id* 6a.

In December 2003, petitioners wrote to Taylor claiming ownership of the painting and demanding its return. Pet. App. 7a. In May 2004, Taylor filed a declaratory judgment action in the U.S. District Court for the Central District of California to establish clear title.[2] Only afterwards, in October 2004, did petitioners file a complaint in the same federal district court, asserting various federal and state-law causes of action against Taylor and seeking return of the painting.

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1. "A *catalogue raisonné* is an annotated, illustrated book . . . which constitutes 'a definitive listing and accounting of the works of an artist.'" Pet. App. 3a (quoting *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d Cir. 1987)).

2. Taylor's action was dismissed for lack of subject matter jurisdiction following dismissal of petitioners' action and is not before this Court.

The District Court dismissed petitioners' first amended complaint pursuant to Fed. R. Civ. P. 12(b)(6), and the U.S. Court of Appeals for the Ninth Circuit affirmed.[3] The Court of Appeals first held that the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998) (the "Redress Act"), does not create a private right of action against private owners of works of art. Applying this Court's test for determining whether a statute creates an implied private right of action, *see Cort v. Ash*, 422 U.S. 66 (1975), the Court of Appeals concluded that (1) there is no indication of legislative intent – even among the statute's sponsors – to create a private right of action for Holocaust victims seeking restitution for artworks confiscated during the Nazi regime; (2) Holocaust victims are not a "beneficiary class" for purposes of *Cort*; (3) the purpose of the Redress Act is to encourage government efforts to facilitate the return of confiscated property and to broaden access to information regarding potential claims; and (4) the availability of state-law remedies renders implication of a federal right of action inappropriate. Pet. App. 8a-12a. Because the Redress Act "does not satisfy any of the *Cort* factors," the Court rejected petitioners' assertion of a federal right of action. *Id.* 13a.

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3. As is appropriate on a motion to dismiss, the courts below accepted as true all of petitioners' factual allegations, including those regarding the painting's provenance and the circumstances of Taylor's acquisition of it. Pet. App. 7a-8a, 19a. Respondent, however, controverted these allegations in her amended complaint for declaratory relief and would continue to do so in the unlikely event that this litigation continues.

Second, the Court of Appeals held that petitioners' state-law claims were time-barred. California law, which applies to petitioners' claims, provides a three-year statute of limitations for actions arising from the taking of goods or chattels. Pet. App. 13a. That law was amended in 1983 to include a "discovery rule" governing actions for recovery of artwork under which a cause of action accrues when the rightful owner discovers the whereabouts of the artwork. *Id.* Petitioners agreed that their claims of a 1930s theft and a 1963 conversion were subject to the pre-1983 statute of limitations, but they argued that under a decision of a California intermediate appellate court, an "actual discovery" rule applied. *Id.* The California Supreme Court had not squarely decided what accrual rule governs in these circumstances, but in 1988 it had held that its discovery rule incorporated constructive notice. *Id.* (citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1009 (1988)). The Court of Appeals concluded that in light of *Jolly*, the California Supreme Court would apply the constructive notice concept to pre-1983 actions for theft and conversion. *Id.* 14a. Because it was apparent from the face of petitioners' complaint that Taylor's acquisition of the painting was discoverable "most probably" by 1963, when she acquired it at auction, and "at least by" 1990, when she offered it for sale through Christie's auction house, the Court of Appeals held that petitioners' claims expired in or before 1993 (three years after the 1990 sale offer). *Id.* 15a.

REASONS FOR DENYING THE PETITION

The judgment of the Court of Appeals was correct and does not conflict with any decisions of this Court or any other court of appeals. Whatever the merit, if any, of petitioners' public policy arguments, they are properly directed to Congress, not to this Court. Accordingly, further review is not warranted.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

Contrary to petitioners' contention, *see* Pet. 14-20, the circuit courts are not divided on the question of the statute of limitations applicable to claims involving stolen art. While the cases relied upon by petitioners do apply different accrual rules and limitations periods to replevin claims involving stolen art, those differences are purely a function of differences in state law, not of any split among the circuits on a question of federal law. In each of the cases cited by petitioners, a federal circuit court sitting in diversity applied substantive state law to determine whether a claim was timely filed. For example, the Second Circuit applied New York's "demand-and-refusal" accrual rule. *See Hoelzer v. City of Stamford*, 933 F.3d 1131, 1135-38 (2d Cir. 1991) (citing *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 569 N.E.2d 426, 667 N.Y.S.2d 623 (1991)). The Sixth Circuit applied Ohio law, under which questions of constructive notice in a replevin action generally are reserved for the jury, *see Charash v. Oberlin College*, 14 F.3d 291, 300 (6th Cir. 1994), and the Seventh Circuit interpreted Indiana law as requiring a plaintiff to exercise due diligence in discovering a theft, *see Autocephalous Greek-Orthodox Church of Cyprus*

v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990). The fact that state laws impose varying rules governing the timeliness of claims to recover personal property is not a ground for intervention by this Court.

II. PETITIONERS' REMAINING CONTENTIONS ARE ERRONEOUS AND DO NOT WARRANT REVIEW BY THIS COURT

A. The Court of Appeals Correctly Held That the Redress Act Does Not Create an Implied Private Right of Action for Artwork Confiscated During the Nazi Regime

The Court of Appeals properly rejected petitioners' contention that the Redress Act creates an implied private right of action for recovery of artwork confiscated during the Nazi regime. Petitioners claim that the Redress Act, along with the Nazi War Crimes Disclosure Act, Pub. L. No. 105-567, 114 Stat. 2865 (1998), and the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611 (1998), evince a congressional intent to encourage such private actions. Pet. 2, 23-24. As the Court of Appeals held, the Redress Act's "Sense of the Congress" provision, upon which petitioners heavily rely, is precatory and does not create any enforceable rights. Pet. App. 9a-10a (citing, *inter alia*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979)). The other two statutes do not even address restitution for private individuals: the Nazi War Crimes Disclosure Act requires disclosure of U.S. government documents relating to assets confiscated by the Nazis, and the Holocaust Assets Commission was created to investigate Nazi-confiscated assets that might be held by the U.S. government. Neither statute even makes reference to litigation by individuals as opposed to governmental action, much less expresses an intention to create a private right of action.

Even assuming, *arguendo*, that petitioners' argument on this point had any merit, there is no division among the federal courts on this question. It appears that only one other federal court has considered whether the Redress Act creates an implied private right of action to recover artwork confiscated by the Nazis and, like the courts below, concluded that it does not. *See Schopes v. The Andrew Lloyd Webber Art Foundation*, 06-CV 12934 (JSR) (S.D.N.Y.) (transcript of Nov. 7, 2006 preliminary injunction hearing at 5-7 (filed as supplemental authority by Ninth Circuit on Nov. 16, 2006)). Nor do public policy concerns, *see* Pet. 25-29, provide a basis for further review by this Court. To be sure, Holocaust-era restitution claims may raise significant legal and moral issues, and Congress expressed its view in the Redress Act that governments should take steps to facilitate enforcement of Holocaust victims' rights. But the existence of these issues does not transform what is essentially a case about a state statute-of-limitations law into one that presents a certworthy issue for this Court to resolve.

B. The Court of Appeals Correctly Held That Petitioners' State Law Claims Are Time-Barred

Petitioners ask this Court to address two alleged flaws in the Court of Appeals' ruling that their action was time-barred: first, they contend that the courts below improperly resolved factual questions on a motion to dismiss, and second, they claim that the Court of Appeals failed to apply controlling state-court precedent in determining when their claims accrued. Both of these contentions merely request error correction that does not merit this Court's review. Moreover, petitioners' assertions of error are meritless.

Petitioners concede that a statute of limitations defense may be raised in the context of a 12(b)(6) motion if the untimeliness of the claim appears on the face of the complaint. Pet. 12. What they dispute is whether the allegations in their complaint did, in fact, demonstrate that their claims were untimely. *Id.* As both courts below held, the complaint makes clear that Taylor's acquisition of the painting was discoverable probably in 1963, when it was purchased for Taylor at a public auction, and, at the latest, by 1990, when she offered it for sale at a public auction. *See* Pet. App. 15a, 25a. Under California's three-year statute of limitations, the claims thus became untimely no later than 1993.[4]

Petitioners' second objection – that the Court of Appeals erred by failing to follow the "actual discovery" rule articulated in *Naftzger v. Am. Numismatic Soc'y*, 42 Cal. App. 4th 421, 49 Cal. Rptr. 2d (Cal. Ct. App. 2d Dist. 1996) – is wrong as a matter of law. As an initial matter, petitioners fail to note that just weeks after it was handed down, *Naftzger*, an intermediate appellate court decision, was criticized by another California intermediate appellate court in *Soc'y of Cal. Pioneers v. Baker*, 43 Cal. App. 4th 774, 783, 50 Cal. Rptr. 2d 865, 870 n.10 (Cal. Ct. App. 1st Dist. 1996), on the ground that it was inconsistent with California precedent. Thus, the Ninth Circuit was presented with conflicting intermediate appellate decisions regarding the applicable accrual rule. In any event, rulings of lower state courts are not controlling "where the highest court of the State has not spoken on the point." *Comm'r of Internal Revenue v. Estate*

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4. Although petitioners contend that the Court of Appeals should have equitably tolled the statute of limitations, *see* Pet. 13-14, that would have been inappropriate given petitioners' lack of reasonable diligence in identifying and pursuing their claim.

of Bosch, 387 U.S. 456, 465 (1967) (citation omitted). The Court of Appeals' determination that, if confronted with the issue, the California Supreme Court would have followed its own precedent holding that discovery rules generally incorporate a principle of constructive knowledge, Pet. App. 14a (citing *Jolly*, 44 Cal. 3d 1103), is reasonable and provides no basis for a grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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